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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1164

BOBBY WADE HOLLAND,
Petitioner,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE
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BOBBY WADE HOLLAND,
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SEABOARD COAST LINE
RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, SEABOARD COAST LINE RAILROAD COMPANY, opposes the Petition for a Writ of Certiorari filed before this Court by Petitioner. Hereafter the Petitioner will be referred to as HOLLAND, and Respondent will be referred to as SCL. References to the Appendix filed by Petitioner will be (P.A. ____), and references to the Appendix attached to this brief will be (R.A. ____).

OPINION BELOW

The initial finding in favor of SCL was a verdict returned by the jury following a lengthy trial and after they were properly charged on the applicable law under the Plaintiff's theories of liability brought pursuant to the Federal Employers Liability Act, the Safety Appliance Act, the Boiler Inspection Act and the Power Brake Law. Thereafter, the Plaintiff filed a Motion for New Trial listing twenty-eight (28) reasons why the trial court should set aside the jury's verdict in this FELA action (R.A. 3a-15a). Following oral arguments on the motion, the trial court denied Plaintiff's Motion for New Trial (P.A. 13-19).

HOLLAND then filed an appeal with the District Court of Appeal of Florida, First District, raising four issues, none of which involved the first three questions presented to this Court by their Petition for a Writ of Certiorari (R.A. 16a-17a). Following oral argument, the District Court of Appeal of Florida, First District, issued their Opinion (P.A. 1-7), affirming the jury verdict and the trial court's denial of HOLLAND'S Motion for New Trial. Thereafter, a timely Petition for Rehearing as well as a Suggestion for Certification was denied without Opinion by the District Court of Appeal of Florida, First District, on January 12, 1978. A Petition for a Writ of Certiorari to the Supreme Court of Florida was filed and denied without Opinion on May 17, 1978; a timely Petition for Rehearing filed by HOLLAND in the Supreme Court of Florida was denied without Opinion on August 28, 1978.

JURISDICTION

Petitioner attempts to invoke this Court's jurisdiction to review the questions presented in their Petition under 28 U.S.C. §1257(3). Respondent challenges the contention of Petitioner that this is a case which is a proper matter for review by a Writ of Certiorari. This case does not question the validity of a treaty or statute of the United States nor is the validity of a state statute drawn in question as being repugnant to the Constitution, treaties or laws of the United States. This is particularly true where three of the four questions presented in the Petition were never properly raised in the state trial or appellate courts. There is not any conflict between the decision below and any prior decisions of this Court; in fact, prior decisions of this Court are completely and totally consistent with the result reached below. Therefore, Respondent respectfully submits that this case does not present a proper matter for review by this Court by a Writ of Certiorari and the Petition should be denied.

QUESTIONS PRESENTED

Respondent takes issue with the four questions presented by Petitioner. Questions 1, 2 and 3 of Petitioner's brief have never been properly presented or raised in the state court and for that reason only question 4 is properly before this Court. Therefore, the questions actually presented are as follows:

1. Should this Court accept jurisdiction to consider matters not preserved nor presented in the state courts below?

2. Even assuming questions 1 through 3 of Petitioner's brief had been properly presented and preserved in the state courts below, should this Court accept jurisdiction on a case where there is no conflict with decisions of this Court and the points involved have been previously decided by this Court adversely to Petitioner?

a. Florida's rules of pleading and practice are totally consistent with federal rules of pleading and practice and impose no limitation of the rights granted under the Federal Employers Liability Act.

b. Petitioner was granted leave to amend Complaint numerous times and in fact no Motion to Amend was ever denied and Plaintiff submitted numerous theories of liability to a jury which decided the case adverse to Petitioner; Petitioner was not deprived of any right to jury trial, but in fact had a jury trial.

3. Should this Court accept jurisdiction in a case where the trial court correctly charged the jury, consistent with decisions of this Court, on legal causation under the Federal Employers Liability Act?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 28 U.S.C. §1257(3) provides in relevant part:

"State courts; appeal; certiorari
Final Judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) by writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, or
* * *"

2. Florida Rule of Civil Procedure 1.190 (a) and (b) provides as follows:

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party and leave shall be given freely when justice so requires. A Party

shall plead in response to an amended pleading within twenty days after service of the amended pleading unless the court otherwise orders; provided that if a motion or pleading has been served in response to a prior pleading and a party does not plead or move in response to the amended pleading, the original response shall be considered as pleaded to the amended pleading.

(b) Amendments to Conform with the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure to so amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits."

3. Federal Rule of Civil Procedure 15(a) and (b) states as follows:

> "(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.
>
> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these

issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

4. Florida Statute §59.041 (1975):

"No judgment shall be set aside or reversed, or new trial granted by any Court of the State in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the Court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This Section shall be liberally construed."

5. Federal Rule of Civil Procedure 61:

"HARMLESS ERROR. No error in either the admission or the exclusion of evidence and no

error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

1. Proceedings Below

HOLLAND filed his Complaint against SCL on November 19, 1974, for damages pursuant to the Federal Employers Liability Act, 45 U.S.C. §51, and the Boiler Inspection Act, 45 U.S.C. §22. Thereafter, HOLLAND filed an Amended Complaint which set forth eleven specific allegations concerning the alleged negligence pursuant to the FELA as well as containing a second count under the Plaintiff's allegations concerning the Boiler Inspection Act (P.A. 7-13).

On October 10, 1975, HOLLAND filed yet another Motion to Amend the Amended Complaint and on October 15, 1975, he filed still another Motion to Amend the Amended Complaint. As was the case in every instance where HOLLAND moved to amend the plead-

ings, the Motion was granted. In the numerous amendments to the original Complaint only one additional allegation of negligence (apart from the original eleven allegations) was added by the Plaintiff which read as follows:

> "(1) In negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was known by the Defendant to be hazardous when there was a safer alternative method of accomplishing the same objective."

During the various amendments to the original Complaint, a third count was also added alleging violations of the Safety Appliance Act.

During the pre-trial conference Plaintiff's counsel amplified what was meant by the twelfth allegation under the FELA count of Plaintiff's Complaint, by stating that when making a pickup of cars in Tifton, Georgia some original cars of the train were held onto by the engine and that this practice constituted an allegedly hazardous method of making the pickup. There was never any mention made of weeds in some other area as has been the case ever since the jury verdict (R.A. 1a-2a). The excerpt from the pre-trial conference included in Petitioner's brief (P.A. 20) is totally out of context and misleading and is not addressed to the issues Petitioner attempts to attribute to those comments.

The trial began on December 1, 1975 and concluded with a unanimous jury verdict in favor of SCL on December 12, 1975. At no time during (or after) the trial did Plaintiff make a Motion to further amend his previously often-amended Complaint, even though Florida Rule of Civil Procedure 1.190 permits it. Plaintiff later filed a lengthy Motion for New Trial (R.A. 3a-15a), which raised none of the matters set forth in Petitioner's first three questions presented to this Court; after argument on the Motion, the trial court denied Plaintiff's Motion for New Trial with a very detailed and learned opinion (P.A. 13-19).

The Plaintiff thereafter appealed to the District Court of Appeal of Florida, First District, raising primarily four issues (R.A. 16a-17a), none of which included the first three questions presented to this Court in the Petition, and the District Court of Appeal affirmed the judgment (P.A. 1-7). HOLLAND then filed a Petition for Writ of Certiorari to the Supreme Court of Florida, which again failed to raise any of the first three questions presented to this Court (R.A. 17a-18a) and their Petition for Writ of Certiorari was denied without Opinion by the Supreme Court of Florida. Thereafter, HOLLAND'S Petition for Rehearing was also denied without Opinion by the Supreme Court of Florida.

2. The Facts Shown At Trial.

Since HOLLAND'S brief includes many matters which in fact were not shown at trial, nor were they proffered at trial, SCL finds it necessary to restate the

facts as well as point out matters which were included in HOLLAND'S Appendix which should not be considered by this Court as they are not part of the Record on Appeal.

The facts brought forth during the trial of this case established that HOLLAND was the brakeman on Train 305, a freight train which ran from Albany, Georgia to Waycross, Georgia, and en route would make several setoffs and pickups of other railroad cars. One of the standard places to pick up additional cars was in the town of Tifton, Georgia. The method utilized on the night of HOLLAND'S accident in Tifton was the same method that had been utilized, without incident, seven days a week, 52 weeks a year, for over 18 years and was in fact the same method used by HOLLAND himself hundreds of times. The engineer of HOLLAND'S crew had used this method since 1947 and had never had complaints from brakemen concerning either the move or his handling of the train during that type of move. HOLLAND, having worked the job hundreds of times, was not only very familiar with the move, but had never complained to anyone concerning the way the move was carried out.

As previously set forth in the Statement of the Case, HOLLAND had numerous theories of negligence under the FELA as well as numerous allegations of violations of the Safety Appliance Act, Boiler Inspection Act and Power Brake Law, all of which allegedly contributed to Plaintiff's accident.

None of the twelve allegations of negligence under the FELA count of HOLLAND'S often-amended Complaint stated that due to some alleged weeds in some area not connected with HOLLAND'S accident that he was required to do the job in the manner in which it was done on the evening of his accident! In fact, the only allegation concerning the method which was used was the twelfth allegation which stated that SCL negligently directed the crew to pick up the cars in Tifton, Georgia by a hazardous method (a contention which was unanimously decided adverse to Plaintiff by the jury), when *there was a safer alternative method* of accomplishing the same objective (it *was not* alleged that *there should have been a safer alternative* of accomplishing the same objective, *but for some negligently maintained condition*). As the trial court's Order denying Plaintiff's Motion for New Trial (P.A. 14-17) so acutely points out, the "weed theory" has been a total afterthought when trying to analyze why the jury's unanimous verdict was adverse to them. In fact, HOLLAND'S attorneys at no point during the trial moved the court to amend their Complaint to include any allegation which has been so strenuously urged as a theory ever since the adverse verdict.

HOLLAND'S Statement of the Case makes reference to the fact that during discovery, prior to the trial, inquiry was made of several persons concerning the area south of the pass track in Tifton, Georgia. Suffice it to say that voluminous discovery was undertaken prior to trial, some of which clearly went into irrelevant, immaterial matters such as the area south of

the pass track switch in Tifton. It should be noted that the following portions of HOLLAND'S Appendix should be completely disregarded by this Court as they were not even proffered at the trial and in no way constitute a portion of the Record in this case, i.e., the first four questions and answers from the deposition of William Huckeba (P.A. 24-25); all of the excerpts from deposition of Earl Williams (P.A. 26); all of the excerpts of deposition of Shirley Davis (P.A. 22-24). Additionally, the self-serving "diagrams" (P.A. 36-41) were also never proffered nor was anything similar ever even attempted to be introduced into evidence at the trial and should not be considered.

The trial court did allow the Plaintiff's expert, Mr. Zadnichick, to testify that in his opinion the method used to pick up the cars was not reasonably safe and that there were four alternatives which could (and in his opinion should) have been utilized on the evening of HOLLAND'S accident. Thus, the jury had before it for consideration, and were properly charged by the court that they could consider, alternative methods in determining whether or not the method used was reasonably safe under the circumstances.

In addition to the above, it is also noteworthy that there was not one shred of evidence, proffered or otherwise, to indicate that the method used to pick up the railroad cars in Tifton, Georgia on the night of HOLLAND'S accident would have been done any differently that night, irregardless of the condition of

any other area in Tifton, Georgia. In fact, the undisputed evidence was that the method used that night was the very same method that had been used thousands of times without any incidents or problems over a span of years.

As in any trial, there were many contradictions in the evidence concerning the train handling, radio interference or lack of interference, as well as numerous other issues. It is obvious from the jury's verdict, after being properly charged on the law, that they resolved the conflicts in the testimony adversely to HOLLAND.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. The First Three Reasons Stated By Petitioner As To Why The Petition For A Writ Of Certiorari Should Be Granted Were Never Appropriately Raised In The State Trial Court Or State Appellate Court Level And Therefore Should Not Be Considered.

As clearly shown in Plaintiff's Motion for New Trial (R.A. 3a-15a) and by the issues presented to the District Court of Appeal of Florida, First District, (R.A. 16a-17a) and in the issues involved on jurisdiction presented in the Petition for a Writ of Certiorari to the Supreme Court of Florida (R.A. 17a-18a), HOLLAND never raised the first three questions presented to this Court as reasons for granting the Writ.

HOLLAND now seeks to present as questions presented and reasons for granting the Writ, first, that "restrictive local pleading rules" of the State of Florida defeats a federal right of recovery under the Federal Employers Liability Act (Petitioner's questions 1 and 2), and that exclusion of proof constitutes a deprivation of a right to a jury trial under the Seventh Amendment to the Constitution of the United States (Petitioner's question 3). It has always been deemed to be essential to the jurisdiction of this Honorable Court under 28 U.S.C. §1257(3) that a substantial federal question has been properly raised in the state court proceedings. As stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655:

> "* * * the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Here, the questions now presented to this Court have never been raised at the trial court level or the appellate court level, but have in fact been raised for the first time in this Court. This deficiency in and of itself is an adequate and compelling reason to deny Petitioner's Writ for Certiorari.

2. No Conflict With Decisions Of This Court And, In Fact, Even If First Three Questions Presented In Petitioner's Brief Are Considered, The Matter Has Previously Been Decided By This Court Adversely To Petitioner.

Incredibly, HOLLAND refers to the Florida Rules of Pleading as "restrictive", "stringent" and in conflict with "liberal federal notice pleading". How this contention can be made in the face of the Record of this case is astounding.

Florida Rule of Civil Procedure 1.190 is virtually identical to Federal Rule of Civil Procedure 15(a) and (b), both of which freely grant leave to amend the pleadings. In this case, as has already been set forth, the Plaintiff filed numerous motions to amend their original Complaint, all of which were granted. However, the Plaintiff never moved the court for permission to amend their pleadings at any point during the trial, which procedure was readily available to them. By analogy, one would suppose that HOLLAND would also characterize the Federal rules concerning pleading to be "restrictive", "stringent" and "not liberal enough".

While the first three questions presented in Petitioner's brief are all basically the same, Petitioner has treated them in separate categories of the brief. In an effort to simplify the reply, this section of SCL's brief will address all of the points covered under the first three questions of HOLLAND'S brief.

First, HOLLAND'S common theme throughout their first three questions presented center upon their contention that they were prohibited from presenting evidence of a safer alternative method than that which was actually used at the time of his injury. *This is simply not the case!* The trial court allowed HOLLAND to put in evidence of alternative methods through their expert witness, Mr. Zadnichick, who testified as to four alternative methods which, in his opinion, should have been utilized. Zadnichick's fourth alternative method would have involved a brakeman (such as HOLLAND) walking in the area which HOLLAND now alleges to have had weeds. Zadnichick further testified that his fourth alternative was the least efficient of all the alternatives. *The trial court excluded evidence of weeds, not evidence of alternative methods,* which encompassed the very same points HOLLAND continues to complain about. Not only was the Plaintiff permitted to put in evidence of all potential alternatives, but the trial court also charged the jury in its jury charge of 2,741 words as follows:

> "In determining whether or not the Defendant railroad failed to provide the Plaintiff with a reasonably safe place to work, a reasonably safe method of work, and reasonably safe tools and equipment, you may consider the presence or absence of available alternatives."

Thus, the jury in this case had before it evidence of all potential alternative methods for consideration as to

whether or not the method actually used was one which was reasonably safe. The representations made in HOLLAND'S brief are misleading in that they are an attempt to have this Court believe that the jury was permitted to consider only the train movement being utilized at the time of HOLLAND'S injury and was precluded from considering all other alternatives. HOLLAND has continually referred to the exclusion of the alleged weeds as excluding his "theory" from evidence. The fact of the matter is the trial court simply refused to allow evidence of weeds in an area remote from that in which the actual train movement was being conducted at the time of Petitioner's injury. There was no evidence whatsoever that the movement being done at the time of HOLLAND'S injury was done in that manner because of weeds. Also, Petitioner was clearly allowed to present evidence of every possible alternative method of making the movement, including the one that would have involved the Petitioner walking in the area south of the pass track.

Also, as clearly demonstrated by the Record, HOLLAND'S argument concerning "alleged weeds" is totally inconsistent with his pleaded theory that SCL was liable, "(1) in negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was known by the Defendant to be hazardous when there was a safer alternative method of accomplishing the same objective."

There was no evidence that SCL knew the movement to be hazardous; in fact, it had consistently been safely done

that way for years. As the District Court of Appeal of Florida, First District, observed, HOLLAND'S assertion is completely inconsistent with the pleaded theories of negligence. There was simply no relationship between "alleged weeds" and this accident.

To again attempt to set the record straight concerning reality and fantasy, it is necessary to respond to HOLLAND'S representation that at the pre-trial conference prior to the trial, HOLLAND'S counsel apprised everyone of the "weed theory". Keeping in mind that the undisputed evidence, from even HOLLAND himself, established that the particular area where the move was taking place at the time of HOLLAND'S accident provided an excellent walking area which was free of any vegetation, debris, etc., the following demonstrates that HOLLAND'S lead trial counsel was not adequately familiar with the facts at that juncture (P.A. 20):

> "MR. HASTINGS: Your Honor, so you understand what we are talking about, because this is a factual situation, what it is in essence *in this particular area where this movement is taking place, there are high weeds, we are alleging, and there is a lot of debris.* * * * " (emphasis supplied)

The cases cited by HOLLAND under the first three questions presented are clearly not supportive of their

position. Virtually every case cited in HOLLAND'S brief involve situations where the lower court withheld the case from the jury or set aside a jury verdict for the employee and ordered a new trial or, in fact, reversed a jury verdict in favor of the employee. See *Harris v. Pennsylvania Railroad Co.*, 80 S.Ct. 22, 23-26. If anything, the cases cited in HOLLAND'S brief are in support of the reasons why the Writ of Certiorari should be denied, in that the jury in this case considered not only whether the method being utilized at the time of HOLLAND'S accident, which was the same method which had been utilized for years, was reasonably safe, but also was allowed to consider *all* conceivable alternative methods, and after considering all methods, found for SCL. Thus, it is clear that a jury verdict in an FELA case should not be disturbed by an appellate court which is exactly what HOLLAND is urging this Court to do.

Even if we assume that the facts in this case were such that the Plaintiff was precluded from putting on evidence of alternative methods of accomplishing the move (which is, of course, completely opposite from the facts of this case) and was allowed to only put on evidence concerning the actual move being made at the time of the accident, and then we consider the actual fact that HOLLAND'S attorney never moved to amend the pleadings during trial, then the issue has already

been determined in this Court adversely to HOLLAND.

In *Atlantic Coast Line Railroad Co. v. Mims*, 37 S.Ct. 188 (1917), the Defendant railroad attempted to introduce evidence establishing facts which would enable them to assert FELA defenses. The trial court rejected the proffered evidence, holding that it came too late and was not relevant to any issue tendered by the pleadings in the case. The Defendant did not move for leave to amend the Answer, as permitted by the pleading rules of South Carolina. By excluding the testimony, the trial court effectively precluded the Defendant from asserting a defense available under the Federal Employers Liability Act. The Supreme Court of South Carolina affirmed the trial court. This Court held that the railroad's failure to properly raise and present the claim pursuant to the state's system of pleading precluded review of the case by this Court. As stated by Justice Clarke at page 189:

> "This epitome of the action of the state court shows that the claim under the federal statute now made was not presented until after the Plaintiff had rested in the second trial of the case after it had been to the supreme court, and after the Defendant, upon the opening of this second trial, had amended its answer by adding a third defense, without mentioning or

in any manner attempting to plead the Federal claim. Even at this stage of the trial the assertion of the claim consisted only in a tender of testimony, without any application to amend the answer.

To become the basis of a proceeding in error from this court to the Supreme Court of a state 'a right, privilege, or immunity' claimed under a statute of the United States must be 'specially set up and claimed,' and must be denied by the state court. (cite omitted) This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice. (cites omitted) * * *."

At page 190.

"While it is true that a substantive Federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the Plaintiff in error to a Federal right not having been asserted at a time and in a manner calling for the consideration of it by the state supreme court under its established system of practice and pleading, the refusal of the trial court and of the supreme court to admit the testimony tendered in support of such claim is not a denial of a Federal right which this court can

review (cites omitted), and therefore, for want of jurisdiction, the writ of error is dismissed."

On page 20 of HOLLAND'S brief there appears a footnote wherein the admission is made that the pleading should have been amended to conform with the attempted proof. The Florida Rules of Civil Procedure, as previously noted, are vitually identical to the Federal Rules of Civil Procedure concerning amendments to pleadings, and both require that in fact a motion be made to so amend the pleadings, and no motion to amend the previously often-amended Complaint was made during the trial of this case. Thus, as this Court's Opinion in *Atlantic Coast Line v. Mims*, supra., clearly states, having failed to properly utilize the local rules of pleadings of the State of Florida, HOLLAND cannot be heard to now claim that he was denied a federal right and this Court should deny the Petition for Writ of Certiorari. See also *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308.

In short, HOLLAND has failed to properly raise and preserve the three questions presented to this Court; and even if the questions presented had been properly raised and preserved, there is a total absence of any showing of any conflict with the decision sought to be reviewed and any decision of this Court and in fact the decisions of this Court conclusively establish why the Petition for Writ of Certiorari should be denied.

3. The Trial Court Properly Charged Jury In This Case Under Federal Employers Liability Act.

The trial court correctly charged the jury in this case on not only the duties under the FELA, but also the duties owned by SCL under the Safety Appliance Act, Boiler Inspection Act and Power Brake Law. The total jury charge consumed 2,741 words and HOLLAND now complains of two words, i.e., "but for". HOLLAND is confusing the test of a jury case as set forth by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957), and the test of liability once the case in fact goes to the jury. Since there can be no argument that federal decisions are controlling on the issue of the propriety of the jury instructions in FELA cases, the federal decisions which deal with the propriety of jury instructions are relevant here. The Court of Appeals, Third Circuit, accurately stated the rule in *Idzojtic v. Pennsylvania Railroad Co.*, 431 F.2d 1029 (3rd Cir., 1970), as follows:

> "However, the trial judge did not err in so refusing, (to instruct jury that railroad was liable if negligent in the slightest degree) since this court has stated that the 'Rogers case did not decide how a judge should instruct a jury in such cases.'. (citing cases) A trial judge complies with the Rogers test by submitting the case to the jury and not thereafter improperly restricting the jury in their findings either

as to employer negligence or whether it played any part in producing the injuries for which damages are sought." At 1034.

Holdings to that effect are *Ely v. Reading Co.*, 424 F.2d 758 (3rd Cir. 1970), and *Bertrand v. Southern Pacific Co.*, 282 F.2d 569 (9th Cir. 1960).

Rogers, supra., was an FELA case which resulted in a jury verdict in favor of the employee. The Supreme Court of Missouri reversed the jury's verdict on the grounds that the employee's evidence did not support the finding of employer liability. In reversing the Missouri Supreme Court, this Court held that a jury verdict in an FELA case should not be set aside if there were any facts submitted to the jury which could support their verdict. Thus, if there is any evidence of negligence, the case, under the rationale of *Rogers*, supra., must go to the jury; but the jury is certainly not required to find in favor of the employee. This is so because the Federal Employers Liability Act is not a workmen's compensation act, but permits recovery only after proving negligence by the greater weight of the evidence.

Perhaps one of the best discussions of the subject is found in *Funseth v. Great Northern Railway Co.*, 399 F.2d 918 (9th Cir. 1968), cert.den. 393 U.S. 1083. The Plaintiff in that case (having lost the trial) urged the trial court committed prejudicial error in giving the jury the following instruction:

"* * * the term 'proximate cause' means that cause which in a direct, unbroken sequence produces the injury complained of and without such injury would not have happened. * * *" (At page 919)

In finding no error with the trial court's charge, the Ninth Circuit's Opinion states (at 921 and 922):

"In Rogers vs. Missouri Pacific Railway Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.ed.2d 493 (1957), the Supreme Court was again dealing with an evidentiary situation in which the Missouri Supreme Court had reversed a jury award to Plaintiff in an F.E.L.A. case. The Supreme Court granted certiorari and reversed the State Supreme Court upon the ground that the evidence was sufficient to support the jury finding for Plaintiff, pointing out that under F.E.L.A. the test of a jury case is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury, citing Coray v. Southern Pacific Co., supra.

In Bertrand v. Southern Pacific Co., 282 F.2d 569 (9th Cir. 1960), the F.E.L.A. case in which the Plaintiff appealed after an adverse jury verdict, one of the questions on appeal was whether the trial judge had erred in failing to give Plaintiff's requested jury instruction to

the effect that the language of Rogers, i.e., 'played any part, even in the slightest, in producing the injury', constituted a 'test of the liability of the railroad carrier.' *The court, affirming, very properly pointed out that Rogers, supra., was concerned, not with a 'test of liability', but only with a 'test of a jury case'* and held the proposed instructions faulty in that it bound the jury to find what it was entitled to find but was not required to find.

[1] Certainly, the statutory requirement that the injury must have *resulted from negligence* necessarily implies that the injury must have been *caused by the negligence.* The words 'caused' and 'result' are correlative terms, each implying the other. The word 'result' used as a verb, means 'to happen or issue as a consequence or effect of some cause'. The word 'cause' means 'that which produces an effect or result, that from which anything proceeds and without which it would not exist." (See Webster Unabridged Dictionary). (emphasis supplied)

In the instruction here in question the trial court, attempting to further explain the causation required by the statute, told the jury in part that the cause must be a proximate cause, i.e., a 'cause which in a direct, unbroken sequence produces the injury and *without which* the injury would not have occurred.' (emphasis supplied)

[2] The first question is whether Coray and Rogers rendered this instruction erroneous in an F.E.L.A. case. We do not think so.

Both Coray and Rogers recognize, as this instruction substantially states, that the negligence of the railroad must 'contribute' (Coray) at least in part to the injury and that the negligence must 'play a part' (Rogers) even though the very slightest in producing the injury.

The instruction in question merely adds that the cause of the injury must produce the injury in a 'direct unbroken sequence.' We see nothing erroneous in this. Certainly, if the sequence of events between the negligence on the one hand and the injury on the other is broken, then the claimed cause, i.e., the negligence, would not really be a cause at all — nor the injury a 'result' of it.

The instruction in question also adds that the cause must be one *'without which the injury would not have occurred.'* We see nothing erroneous in this. Certainly, if the claimed result, i.e., the injury, would have occurred in any event, even without the negligence of the railroad, then the injury would not really be the 'result' of the negligence, nor the negligence the cause of it." (emphasis supplied)

HOLLAND submits that *Rogers,* supra., stands for the proposition that proximate cause or legal cause has

no place in an FELA action. HOLLAND'S interpretation of *Rogers* is grossly misconstrued. In fact, it is interesting to note that the trial court in *Rogers*, supra., charging the jury, used the actual term "proximate cause" (see page 505, footnote 9).

Since the FELA statute, 45 U.S.C. §51 et seq., is a comparative negligence statute, then obviously for the employee to recover the alleged negligence of the employer does not have to be *the* proximate cause or legal cause, but it must be *a* proximate cause or legal cause which contributed to causing the Plaintiff's injury. As stated by Justice Rutledge in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949) at page 194 and 195:

> "We hold further, in the light of the trial instructions and such evidence as appears in the record before us, that the jury was justified in finding (1) that Respondent breached the Boiler Inspection Act * * * and (2) that such a breach was *a proximate cause of Petitioner's injury.*" (emphasis supplied)

While it is submitted that Judge Smith's concurring Opinion in the District Court of Appeal of Florida, First District, correctly sets forth the causative relationship in an FELA case (P.A. 5-7), it is clear under the decision below as well as numerous other cases that when the entire charge to the jury is considered as a whole, there was no harmful error. *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir., 1975); 3 Devitt & Blackmar, Federal Jury Practice and Instruction, §94.13 (3rd ed. 1977).

While the trial court's entire charge to the jury is voluminous, the following is a typical example of the numerous times that the jury was informed by the court that they must find for the Plaintiff if Defendant's negligence contributed, in whole or in part, to the Plaintiff's injuries and damages:

> "Now, under the Federal Employers Liability Act, the Defendant railroad company is liable if the Defendant, its agents, servants, or employees, acting in the scope of their agency or employment, were negligent *and the negligence played any part, however small, in producing the injury for which damages are sought.*" (emphasis supplied)

Thus, not only does the language with which the jury was charged in this case paraphrase the language of the Federal Employers Liability Act itself, but it is clearly more favorable to HOLLAND than the applicable case decisions require. It is also abundantly clear that there is no conflict with any decisions of this court, and in fact the charge to the jury is entirely proper and consistent with the decisions of this court and other courts concerning legal causation in an FELA case.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HOWELL, HOWELL, LILES,
BRADDOCK & MILTON

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CERTIFICATE OF SERVICE

I, JOSEPH P. MILTON, a member of the Bar of the Supreme Court of the United States do hereby certify that three copies of the foregoing Brief of Respondent, SCL, have been served by mail by depositing the same in a United States mail box with first class postage, prepaid, this ____ day of March, 1979, duly addressed to the following: WALTER H. BECKHAM, JR., ESQUIRE, and JOEL D. EATON, ESQUIRE, of Podhurst, Orseck & Parks, P.A., 25 West Flagler Street, Miami, Florida 33130; SUSAN GOLDMAN, ESQUIRE, PH 1, Roberts Building, 28 West Flagler Street, Miami, Florida 33130; and LAWRENCE V. HASTINGS, ESQUIRE, of Hastings and Goldman, 300 71st Street, Suite 530, Miami Beach, Florida 33140, Attorneys for Petitioner.

JOSEPH P. MILTON
Counsel of Record for
Respondent, Seaboard Coast
Line Railroad Company

APPENDIX

APPENDIX

EXCERPT FROM PRE-TRIAL CONFERENCE

MR. MILTON: As to their amendment. Your Honor, to Count I or the one that says, "negligently instructing or directing the train crew to pick up cars on the pass track in a manner and method as was known by the Defendant to be hazardous when there was a safer alternative method of accomplishing the same objectives.

* * *

Primarily on this amendment, Your Honor, my objection is pretty much the vagueness and broadness of what they are trying to allege. I don't know if they are trying to say somebody negligently instructed the crew or the manner and method the crew did the job was known to be hazardous or what they are saying.

MR. HASTINGS: Your Honor, just to cut through so Your Honor is familiar factually — we are both quite familiar through depositions taken. So, to cut through to the facts he is referring to — we are, in our complaint, *talking about in this particular instance, there was on the head end of the train 13 cars carrying Firestone tires. Our contention is those 13 cars should not have been at the front but should have been in the back of the particular train.*

Had they been in the back, rather than in the front where they were, this accident couldn't have happened. We have taken depositions. Both sides are familiar with it. That is one of the causal factors bringing about this accident.

We also have further evidence that they are aware of it was complained about on the part of the employees saying this is an unsafe and undesirable way of doing it. *So, therefore, this is the gravaman of what we are going forward in, in stating that there was a reasonable alternative way, which there certainly was,* and which they knew about it because they certainly did and were told. That is how it fits in. It is not vague. It is well known to both of us what the testimony will be.

MR. FEHNER: What we tried to do, Your Honor, in drafting this amendment was to try to be as explicit as we could as to this particular act of negligence. I am sure it would be admissible as evidence. We felt in fairness to the Defendant we should set out this specifically as being one of our primary allegations here and one of the things we felt we could prove under the Federal Employers' Liability Act. That was the reason for putting it in. I think there is a good bit of evidence in almost all the depositions as to alternative methods. (Emphasis added).

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

BOBBY WADE HOLLAND,
Plaintiff,

versus

No. 74-11743-CA
Div. "D"

SEABOARD COAST LINE RAILROAD COMPANY, a railroad corporation,
Defendant.

MOTION FOR NEW TRIAL

Pursuant to the Florida Rules of Civil Procedure, Plaintiff BOBBY WADE HOLLAND, moves that the verdict of the jury entered in the above entitled action on December 12, 1975 be set aside and that Judgment entered on said verdict be vacated and set aside and that a new trial be granted to Plaintiff for the following reasons:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is contrary to the manifest weight of the evidence.

5. The Court erred in denying Plaintiff's motion for a directed verdict in Plaintiff's favor at the close of Defendant's case.

6. The Court erred in denying Plaintiff's motion for a directed verdict in Plaintiff's favor at the close of all of the evidence.

7. The Court erred in granting Defendant's objection to and in excluding evidence of weeds, tall grass, etc., south of the pass-track switch, such evidence being vital to the question of Defendant's negligence in failing to provide a reasonably safe place to work and/or a reasonably safe work method under the Federal Employers Liability Act. This negligence-evidence was offered by Plaintiff and excluded by this Court during the testimony of Huckaba, S. E. Davis, J. McCarty, M. Zadnichek and C. B. Thompson, among others, and was causally related to Plaintiff's accident by preventing Plaintiff from riding the engine instead of the last car back to join the train.

8. The Court erred in admitting, over Plaintiff's objection, evidence that the engineer, C. B. Thompson, was and/or is "a good engineer" and other evidence to the same effect, as such evidence of character, reputation, and/or lack of misconduct in prior train operations is totally irrelevant to his conduct in the accident involved in the case at bar and is inadmissible on the issues of negligence and law violation and was highly prejudicial to Plaintiff.

9. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 5 as follows:

> "Discrepancies in a witness' testimony, or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail shall be considered in weighing its significance. But a willful falsehood always is a matter of importance and should be seriously considered."

10. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 11A as follows:

> "Under the Federal Employers' Liability Act defendant Railroad Company is liable if defendant, its agents, servants, or employees, acting in the scope of their agency or employment were negligent however slight and the negligence played any part, however small, in producing the injury for which damages are sought."

11. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 12 as follows:

> "If you find there was a negligent act or omission by the Defendant Railroad and that the Railroad should have reasonably foreseen that such act or omission might cause injury to its employees, then the Plaintiff is entitled recovery for those injuries which he actually sustained without regard to whether the exact nature and extent of his injuries could have been foreseen by the Railroad."

12. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 13 as follows:

> "You are instructed that it is the duty of the master(railroad) to exercise reasonable care and caution to furnish its employee a reasonably safe place in which to work, reasonably safe appliances with which to work, and a reasonably safe method by which to work, and to use a reasonably adequate number of fellow servants for doing the work as may be required in the employment, and it is the duty of the master(railroad) to exercise reasonable care so as not to expose its employee to perils and dangers which may be guarded against by ordinary care and diligence."

13. The Court erred in refusing to give to the jury either Plaintiff's Requested Instruction No. 19 or Plaintiff's Requested Instruction No. 20 as follows:

> "(19) 'In any action brought against any common carrier under or by virtue of (this Act) * * * such employee shall not be held to assume that risk of his employment in any case where such injury * * * resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier * * *.' "

> "(20) 'If you find that the defendant failed to provide the plaintiff with a reasonably safe place to work, and that such failure was the cause of the injuries sustained by the plaintiff, then I charge you that whether or not the plaintiff knew of the unsafe nature of the place or of the dangers existing thereat, if any, is immaterial, and he would be entitled to a judgment against the defendant for his damages.

14. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 21 as follows:

> "Plaintiff has introduced into evidence Section 6 of a certain mediation agreement between plaintiff's union and defendant railroad among others. Whether or not these contract provisions establish a *higher* standard of care on the part of defendant railroad concerning insufficient radio frequencies with respect to the Railroad's negligence or lack thereof is a jury question for your determination. You may consider the plain meaning of the contract Section 6 in this regard."

15. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 23 as follows:

> "If you find that defendant railroad's engineer used the wrong brakes by applying the locomotive brakes rather than the automatic train brakes under the circumstances involved, and that the use of the locomotive brakes caused or contributed to cause unusual and violent slack action, then defendant is responsible for any injury resulting in whole or in part from such negligence, however small a part such negligence played in bringing about plaintiff's injuries.

16. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 24 as follows:

> "If you find that defendant railroad's engineer received a radio signal "3" which caused or contributed to cause said engineer to apply the locomotive brakes at a point when they would not ordinarily have been applied, and that such application caused or contributed to cause unusual and abnormal slack action which played any part, even the slightest, in bringing about plaintiff's injuries, then you must find for plaintiff on the issue of negligence."

17. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 30 as follows:

> "One portion of this case is brought by the Plaintiff under and pursuant to a Federal Safety Appliance Act commonly known as the Boiler Inspection Act. The Boiler Inspection Act provides in part that no railroad may use any locomotive unless the 'locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate' and 'have been inspected from time to time in accordance with' the Boiler Inspection Act.
>
> If you find from the preponderance of the evidence that defendant Railroad violated the Boiler Inspection Act and that the violation played any part, no matter how small, in causing or contributing to cause Plaintiff's injuries, then defendant's liability and responsibility has been established, and you must proceed to the question of damages to be awarded.
>
> You are further instructed that contributory negligence is not a defense in whole or in part to damages wholly or partly caused by a violation of the Boiler Inspection Act, so that you are not to reduce Plaintiff's damages in any amount on account of contributory negligence, if any, on Plaintiff's part."

17(a). The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 35 as follows:

"Another portion of this case is brought by the plaintiff under and pursuant to a part of the Federal Safety Appliance Acts commonly known as the Power Brake Law.

The Power Brake Law provides in part that the air brake system must be inspected according to the law and must be operative, with the air brake hoses coupled between all cars, during all train movements.

If you find from the preponderance of the evidence that the defendant violated the Power Brake Law and that the violation played any part, no matter how small, in causing or contributing to cause plaintiff's injuries, then defendant's liability and responsibility has been established and you must proceed to the question of damages to be awarded to the plaintiff.

You are further instructed that contributory negligence is not a defense in whole or in part to damages caused in whole or in part by a violation of the Power Brake Law and you are not to reduce plaintiff's damages in any amount if you find the violation caused plaintiff's injuries."

18. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 37 as follows:

"You are instructed that negligence (of a Defendant) may be proven by circumstantial

evidence as well as by parol or by word-of-mouth testimony, and I instruct you 'it is true that the evidence must show that the Defendant's negligence was . . . (a) cause of the accident but this may be proven as conclusively by circumstantial as by parol evidence.' 'Negligence may be established by direct or circumstantial evidence and may be inferred from either direct or circumstantial testimony when properly adduced or established' and it is for you as a jury to determine whether or not negligence can reasonably be established by such inferences from the circumstantial evidence of the case. Circumstantial evidence is *similarly permissible* as proof of violations of the Power Brake Law and Boiler Inspection Act."

19. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 39 as follows:

"Plaintiff is entitled to recover the reasonable value of attendant, nursing, and related services provided by his wife, as to both past and future such services reasonably required in view of plaintiff's injuries."

20. The Court erred in refusing to give to the jury Plaintiff's Requested Instruction No. 40 as follows:

"With respect to plaintiff's future loss of earning capacity, you may consider the

evidence presented concerning plaintiff's expected future wage increases based on (1) plaintiff's probable future promotions but for the accident involved, (2) relevant Union/Railroad contract provisions, and (3) productivity increases per man hour."

21. The Court erred in giving to the jury, over Plaintiff's objection, Defendant's Requested Instruction No. 9, as modified by the Court, as follows:

> "Negligence is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes to producing such injury, so that it can reasonably be said that, but for the negligence, the injury would not have occurred. (Std. 5.1)"

22. The Court erred in giving to the jury, over Plaintiff's objection, Defendant's Requested Instruction No. 11, as modified by the Court, as follows:

> "You have been previously instructed that the Defendant had a duty to exercise reasonable care to provide the Plaintiff with a reasonably safe place to work. The phrase, 'reasonably safe place to work', is a phrase of relative application and does not mean the guarantee of absolute safety under every condition. The employer is required to use such care as the circumstances reasonably require."

23. The Court erred in giving to the jury, over Plaintiff's objection, Defendant's Requested Instruction No. 19, as modified by the Court, as follows:

> "The Court instructs the Jury that in the event you should award compensatory damages to the Plaintiff in this case, that any award will not be subject to Federal income taxes and that the Jury should not, therefore, add or subtract taxes in fixing the amount of any award."

24. The Court erred in giving to the jury, over Plaintiff's objection, Defendant's Requested Instruction No. 20, as follows (the Court's modification at the end is not known verbatim to Plaintiff but the instruction as given was also objected to):

> "An injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as such can reasonably be done. He may recover damages for lost earnings, but is precluded from recovery to the extent that he could have earned wages in the past and in the future."

25. The Court erred in excluding Professor Roberts' proffered testimony concerning Plaintiff's probably future wage increases based on probable promotions, Union/Railroad contract provisions, and productivity increases.

26. The Court erred in excluding Professor Roberts' proffered testimony concerning Plaintiff's probable future wage increases based on inflation.

27. It is apparent that the jury's verdict in this cause was the result of prejudice, passion or other improper sentiments or considerations and disassociated from the evidence and testimony in this cause; that the verdict was against the law and the evidence and the manifest weight of the evidence and that the jury clearly did not understand the law in this Court's charge to the jury and/or did not apply such law to the facts demonstrated by the evidence; and that the verdict is such as to shock the judicial conscience of this Court.

28. Plaintiff would suggest that the jury acted upon matters not in "evidence" and not within their common knowledge. Upon information and belief the jury communicated in writing with all counsel and the Court on the last day of trial before being charged by the Court as to the law, despite being instructed by this Court to have no communications with counsel for Plaintiff or Defendant.

WHEREFORE, Plaintiff, BOBBY WADE HOLLAND, respectfully submits that a New Trial should be granted to Plaintiff.

HASTINGS & GOLDMAN
Attorneys for Plaintiff
300 - 71 Street
Suite 530
Miami Beach, Florida, 33141
861-4971

Lawrence V. Hastings

I HEREBY CERTIFY that a true copy of the above Motion for New Trial was furnished to TOOLE, TAYLOR, MOSELEY & MILTON, Attorneys for Defendant, 1014 Barnett Bank Building, Jacksonville, Florida, 32202, this ____ day of December, 1975.

Lawrence V. Hastings

ISSUES PRESENTED

I

WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF WEEDS, TALL GRASS, DEBRIS, ETC., SOUTH OF THE PASS TRACK SWITCH WHERE SUCH EVIDENCE WAS VITAL ON QUESTION OF SEABOARD'S NEGLIGENCE IN FAILING TO PROVIDE A REASONABLY SAFE PLACE TO WORK AND/OR REASONABLY SAFE WORK METHOD UNDER THE FEDERAL EMPLOYERS LIABILITY ACT — WHETHER THE TRIAL COURT IMPROPERLY DENIED HOLLAND'S MOTION FOR NEW TRIAL (Raised by Assignments of Error Nos. 1-3, 14, 35, 35 (a), 46, 69).

II

WHETHER THE TRIAL COURT ERRED IN ITS CHARGE TO THE JURY ON CAUSATION IN THIS FELA AND SAFETY APPLIANCE ACT CASE BY INCLUDING "BUT FOR" PROXIMATE CAUSE LANGUAGE THEREIN — WHETHER THE TRIAL COURT ERRED IN DENYING HOLLAND'S MOTION FOR NEW TRIAL (Raised by Assignments of Error Nos. 1-3, 17, 29, 36-38, 61, 69).

III

WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTIONS TO INTERVIEW

JURORS, INCLUDING ALTERNATES AND IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL (Raised by Assignments of Error Nos. 1-11, 67-69).

IV

WHETHER THE TRIAL COURT ERRED IN DENYING HOLLAND'S MOTION FOR NEW TRIAL WHERE THE VERDICT FOR SEABOARD IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE (Raised by Assignments of Error Nos. 1-3, 13, 40-43, 69).

ISSUES INVOLVED ON JURISDICTION

The issues involved on jurisdiction are:

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS IN JURISDICTIONAL DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

A) ON ADMISSIBILITY OF PROOF CONCERNING AN ALTERNATIVE METHOD AND SITE WHICH WAS NOT USED BECAUSE OF RAILROAD FAULT IN AN FELA CASE, UNDER A COMPLAINT ALLEGING NEGLIGENCE IN FAILURE TO PROVIDE A REASONABLY SAFE PLACE TO WORK; AND IN DIRECTING

HAZARDOUS METHOD WHEN THERE WAS A SAFER, ALTERNATIVE METHOD;

B) ON EFFECT OF IMPROPER EXCLUSION OF SUCH EVIDENCE;

C) AND WHETHER DECISION IS IN JURISDICTIONAL DIRECT CONFLICT WITH PRIOR DECISION OF THIS COURT AND PRIOR DECISION OF THIRD DISTRICT HOLDING THAT IT IS HARMFUL ERROR TO INSTRUCT JURY ON "PROXIMATE CAUSE" CONCEPT IN FELA CASE.